UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SALLY STEWART,

Plaintiff

v. **Civil Action No. 2:09-126**
(lead case)

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY, a West Virginia corporation doing business as BrickStreet Mutual Insurance Company and BrickStreet Administrative Services,

Defendant

BETTY MCGHEE,

Plaintiff

v. **Civil Action No. 2:09-127**

WEST VIRGINIA EMPLOYERS' MUTUAL INSURANCE COMPANY, a West Virginia corporation doing business as BrickStreet Mutual Insurance Company and BrickStreet Administrative Services,

Defendant

MEMORANDUM OPINION AND ORDER

Pending are the plaintiffs' motions to remand, filed March 11, 2009, and March 23, 2009. Also pending is the plaintiffs' motion to supplement the exhibits to their motions to

remand, filed April 29, 2009, which motion is ORDERED granted.

I. Procedural Background

This action arose after the plaintiffs, Sally Stewart and Betty McGhee, were denied long term disability benefits on the ground that their disabilities were pre-existing conditions. The plaintiffs instituted separate actions in the Circuit Court of Kanawha County on February 15, 2007 and March 2, 2007, naming three defendants to their substantially identical two-count complaints: Commercial Insurance Service, Inc. ("CIS"), Guardian Life Insurance Company of America ("Guardian"), and West Virginia Employers' Mutual Insurance Company, doing business as BrickStreet Mutual Insurance Company and BrickStreet Administrative Services ("BrickStreet"). BrickStreet was the plaintiffs' employer. Guardian was the insurer and administrator of BrickStreet's benefits plan, and, according to the complaints, CIS was BrickStreet's agent and advocate regarding the benefits program.[1] Count I alleged negligence, fraud in the inducement, and breach of contract under state law against BrickStreet and CIS. Count II was a claim against CIS, Guardian, and BrickStreet

[1] The plaintiffs settled with CIS, and CIS was dismissed on March 17, 2008.

for benefits arising under the Employee Retirement Income Security Act of 1974 ("ERISA").

In March 2007, the defendants removed both cases to this court on the basis of complete preemption under ERISA.[2] The plaintiffs moved to remand, and their motion was denied by order entered December 5, 2007. In the order, the court held that Count II plainly stated a claim for benefits under ERISA, of which this court had jurisdiction, and that the court had supplemental jurisdiction over Count I under 28 U.S.C. § 1367 by virtue of its joinder with Count II. The court did not consider whether Count I was completely preempted.

In December 2007, BrickStreet moved to dismiss Count I on the ground that it was preempted by § 514 of ERISA (ordinary preemption), or in the alternative, to recharacterize Count I as a federal claim pursuant to § 502(a) of ERISA on the basis of complete preemption. In March 2008, BrickStreet, Guardian, and the plaintiffs filed motions for summary judgment, and the plaintiffs renewed their motions to remand Count I.

By order entered September 25, 2008, the court denied

[2] Stewart's case was assigned number 2:07-cv-168, and McGhee's case was assigned number 2:07-cv-222.

BrickStreet's motion to dismiss or, in the alternative, to recharacterize Count I as a federal claim. The court held that Count I, when viewed in the light most favorable to the plaintiffs, sought damages measured by benefits that the plaintiffs may have been entitled to under a governmental benefits plan in connection with their previous employment with the State which they gave up in accepting employment with BrickStreet in reliance on the promises made by the defendants regarding the benefits to which they believed they were entitled under BrickStreet's benefits plan. On the same day, the court granted summary judgment to Guardian and BrickStreet on Count II and dismissed Count II, but denied summary judgment as to Count I. The court remanded Count I to the Circuit Court of Kanawha County on the ground that the only federal issue (Count II) had been resolved and the only remaining issue (Count I) was not related to any issues of federal policy.

On February 11, 2009, the defendants again removed the plaintiffs' cases.[3] The cases were consolidated on March 23, 2009. BrickStreet is the only remaining defendant, and Count I is the only pending claim. As grounds for removal, BrickStreet

[3] Each case was assigned a new case number. Stewart's case was assigned number 2:09-cv-126, and McGhee's case was assigned number 2:09-cv-127.

again contends that Count I is completely preempted. BrickStreet now bases its contention on the plaintiffs' responses to BrickStreet's interrogatories, which were served and responded to in state court after the cases were remanded. The plaintiffs' responses indicate that the plaintiffs seek not only damages measured by benefits foregone, but also damages measured by the benefits available under BrickStreet's ERISA benefits plan.

The relevant interrogatories and responses state as follows:

> **INTERROGATORY NO. 1: State whether or not all or any part of the compensation that you seek to recover from BrickStreet in this action includes (I) payments equaling 60 percent of your monthly earnings as a BrickStreet employee for each month beginning on a date some time in calendar year 2006 until you reach age 65 or (ii) an amount that is based in any way on payments equaling or the value of 60 percent of your monthly earnings as a BrickStreet employee.**
>
> > **ANSWER: Plaintiff in her state law claim in Count I seeks a one-time lump sum of damages for loss of benefits including recall rights, sick leave, healthcare, and regular and disability benefits which she would have been eligible to receive from the State of West Virginia had not BrickStreet breached the employment contract. Plaintiff also seeks mental anguish, annoyance, inconvenience, and punitive damages because BrickStreet is guilty of fraud and negligence in the inducement of the plaintiff to leave her job with the State of West Virginia and accept employment with BrickStreet. Based upon information provided to me by my attorney, damages may be measured in part by the loss of the 60% of the monthly earnings.**

INTERROGATORY NO. 2: **If the answer to Interrogatory No. 1 is no,**

a. Explain in detail the nature and amount of the compensation that you are seeking to recover from BrickStreet in this action; and

b. Explain precisely how you determined such amount.

ANSWER: **No answer required.**

INTERROGATORY NO. 3: **If the answer to No. 1 is yes,**

a. Explain the reason that you believe you are entitled to such compensation; and

b. State the date in 2006 from which you are seeking payments of 60 percent of your monthly salary as a BrickStreet employee or the value of such payments; and

c. If you are seeking compensation from BrickStreet in this action an amount that is based in any way on payments equaling 60 percent of your monthly earnings as a BrickStreet employee explain precisely how you determined such amount; and

d. Explain in detail the nature and amount of any compensation, in addition to that which is described in Interrogatory No. 1, that you seek to recover from BrickStreet in this action; and

e. Explain precisely how you determined such additional compensation.

ANSWER:

a. BrickStreet breached its contract and was guilty of fraud and negligence.

b-c. A jury may be allowed to consider and my damages may be measured in part by my lost disability benefits which I would have received which may be calculated at 60% of my monthly salary of $2,990.00, from the date of

> my disability on March 20, 2006, until I reach the age of 65 on March 18, 2018.
>
> d-e. Damages for breach of contract, negligence, mental anguish, annoyance and inconvenience, and punitive damages are for the jury to decide.

(Mem. Supp. Mot. 6-7).

On February 9, 2009, before BrickStreet removed the plaintiffs' actions to federal court, BrickStreet notified the plaintiffs that it considered their responses to interrogatories 1 and 3 insufficient. Specifically, BrickStreet observed with respect to interrogatory number 1 that the plaintiff was seeking damages for loss of state benefits in addition to damages measured by 60 percent of the plaintiffs' monthly BrickStreet compensation to age 65. As to interrogatory number 3, BrickStreet requested that the plaintiffs explain how they intended to calculate the amount of lost state benefits. The plaintiffs responded on April 29, 2009, with supplemental answers to BrickStreet's interrogatories. In the supplemental answers, the plaintiffs demonstrated their calculation of lost state benefits, but did not dispute BrickStreet's observation that they were seeking damages measured by 60 percent of their monthly BrickStreet compensation to age 65 in addition to lost state benefits.

II. Waiver

The plaintiffs contend that they are entitled to remand because BrickStreet has waived its right to remove by engaging in sufficient activity in state court to manifest an intent to litigate there. The plaintiffs base their argument on two actions taken by BrickStreet in state court after the basis for removal became apparent, namely, BrickStreet's signing of a proposed agreed order to consolidate the plaintiffs' cases and BrickStreet's request to the plaintiffs for an extension of time in which to object to the plaintiffs' discovery responses.

A defendant may waive its thirty-day right to removal under 28 U.S.C. 1446(b) if it demonstrates a "clear and unequivocal" intent to remain in state court, but "such a waiver should only be found in 'extreme situations.'" Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991) (holding that defendant did not waive right to removal where it participated in a hearing on its motion for summary judgment despite the dismissal of the non-diverse party, which occurred at the beginning of the same hearing); compare Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262 (4th Cir. 1998) (holding that defendant did not waive right to remove where defendant filed

removal papers and then filed a notice of removal and a third party motion for summary judgment in state court); and Sayre Enter., Inc. v. Allstate Ins. Co., 448 F. Supp. 2d 733 (W.D. Va. 2006) (finding no waiver where defendant filed an answer and grounds of defense, a motion craving oyer and demurrer, and objections to the plaintiff's first set of discovery requests in state court before removing); and Hawes v. Cart Prods., Inc., 386 F. Supp. 2d 681 (finding no waiver where defendant filed motion for relief from default, a motion challenging service of process, a motion to continue a damages hearing, and a motion to shorten the time for discovery responses in state court before removing); with Wolfe v. Wal-Mart Corp., 133 F. Supp. 2d 889 (N.D. W. Va. 2001) (holding that defendant waived right to removal where it filed a motion for summary judgment in state court while on notice that the non-diverse party was being dismissed from the case).

The court concludes that BrickStreet's signing of a proposed agreed order of consolidation and BrickStreet's request for an extension of time in which to object to the plaintiffs' discovery responses do not constitute the type of actions that demonstrate a "clear and unequivocal" intent to remain in state court. Nothing about the circumstances of BrickStreet's conduct

makes this an "extreme situation." Accordingly, BrickStreet has not waived its right to remove to federal court.

III. Jurisdiction

The plaintiffs contend that this action should be remanded because they are seeking only reliance damages -- damages measured by the benefits they gave up as state employees when they left their employment with the state and accepted employment with BrickStreet. The court has already determined that such a claim affects BrickStreet's ERISA plan "in too tenuous, remote, or peripheral a manner" to be completely preempted. As BrickStreet aptly notes, however, the plaintiffs' responses to BrickStreet's interrogatories belie their representations to the court as to the damages they seek. According to their interrogatory responses, the plaintiffs are seeking not only reliance damages, but also damages measured by the loss of 60% of their monthly earnings as BrickStreet employees. To the extent the plaintiffs seek the latter form of damages, it appears that they are attempting to use their state claims as an alternative enforcement mechanism to obtain benefits under an ERISA benefit plan. Their claims are, accordingly, completely preempted.

Complete preemption is a narrow exception to the well pleaded complaint rule. Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). Under this doctrine, a federal district court has subject matter jurisdiction if "the subject matter of a putative state law claim has been totally subsumed by federal law – such that state law cannot even treat on the subject matter." Lontz v, Tharp, 413 F.3d 435, 439-40 (4th Cir. 2005). When complete preemption exists, federal law provides the exclusive cause of action, and in essence "there is . . . no such thing as a state-law claim." Id. at 440 (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003)). "The doctrine of complete preemption thus prevents plaintiffs from 'defeat[ing] removal by omitting to plead necessary federal questions.'"[4] Id. (quoting

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[4] **The doctrine of complete preemption is starkly different from the defense of federal conflict or ordinary preemption. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); Pinney v. Nokia, Inc., 402 F.3d 430, 449 (4th Cir. 2005). "Under ordinary or conflict preemption, 'state laws that conflict with federal laws are preempted, and preemption is asserted as a federal defense to plaintiff's suit.'" Sonoco Prods. Co. v. Physicians Health Plan Inc., 338 F.3d 366, 370–71 (4th Cir. 2003). As the Fourth Circuit has explained:**

> **The absence of a federal cause of action says nothing about whether the state claim is preempted in the ordinary sense: it is entirely within the power of Congress to completely eliminate certain remedies by preempting state actions, while providing no substitute federal action. But in such cases, preemption serves only as a federal defense, the barred claims are not**

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 22 (1983)).

A state law claim is completely preempted and the action is, accordingly, removable under ERISA if the state law claim "relates to" an employee benefit plan within the meaning of section 514(a), 29 U.S.C. § 1144(a), and falls within the scope of the statute's civil enforcement provisions, which are found in section 502(a), 29 U.S.C. § 1132(a). Smith v. Dunham-Bush, Inc., 959 F.2d 6, 8 (2d Cir. 1992). ERISA § 502(a) provides in pertinent part:

> **A civil action may be brought–(1) by a participant or beneficiary– . . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .**

29 U.S.C. § 1132(a)(1)(B)("ERISA § 502(a)(1)(B)").

> **completely preempted, and thus not removable to federal court.**

King v. Marriott Int'l, 337 F.3d 421, 425 (4th Cir. 2003). A case cannot be removed pursuant to section 1331 solely on the basis of federal conflict or ordinary preemption defenses but can be removed if the complete preemption doctrine applies. Pinney, 402 F.3d at 449; King, 337 F.3d at 425; Abbot v. Am. Cynamid Co., 844 F.2d 1108, 1111 (4th Cir. 1988). It is important to note the federal preemption defense may still be properly raised in state court if the complete preemption doctrine is found not to be present and remand is appropriate. See e.g. Caterpillar, Inc., 482 U.S. at 397; King, 337 F.3d at 425.

The plaintiffs' claims of entitlement to damages measured by the loss of 60% of their monthly earnings as BrickStreet employees are similar to the state law claims alleged by the plaintiff in Chapman v. Health Works Med Group of West Virginia, Inc., 170 F. Supp. 2d 635 (N.D. W. Va. 2001) (Keeley, J.), which the court found to be completely preempted. According to the Chapman plaintiff, his claims were not preempted by ERISA because he was not seeking benefits from the plan or asserting wrongdoing by the plan personnel. Id. at 639. Rather, he contended he was suing his former employer for damages because the employer falsely represented that his disability benefits would continue without interruption during his employer's merger with another company, and because the employer's misrepresentations fraudulently induced him to allow his disability benefits to expire without converting to an individual policy. Id. The court held that although the plaintiff's tort claims did not expressly refer to ERISA or affect the structure or administration of the plan, the plaintiff was using state law as an alternative enforcement mechanism to receive ERISA plan benefits, and so his claim was "related to" an employee benefit plan within the meaning of section 514(a). Id. at 640. The court further held that inasmuch as the plaintiff's damage request was couched in terms of policy benefits, he was

essentially seeking to recover or enforce benefits due him as a former employee and plan participant based on the oral promise of his employer, and, so, his claim was preempted by section 502(a). Id. at 641. Similarly, to the extent the plaintiffs here are seeking damages couched in terms of BrickStreet's plan benefits, it appears that they are using state law as an alternative enforcement mechanism to receive plan benefits.

The plaintiffs contend that their state claims are more akin to the claims asserted in Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989), which the court determined were not completely preempted. In Pizlo, the defendant employer modified the terms of the pension plan to include a penalty for early retirement. Id. at 117. In a meeting with employees about the change to the plan, the employer represented to the plaintiffs that there would be no more cuts in staff. Id. Two and a half years later, the plan was amended to freeze the level of retirement benefits to those earned as of the year of the amendment. Id. The plaintiffs were subsequently terminated before their 62nd birthdays, and the amendments resulted in their receiving lower benefits than they would have received had they remained employed until age 62. Id. at 117-18. The court held that the plaintiff's state law claims for breach of contract were

not completely preempted because they did not raise a question of the plaintiffs' eligibility for benefits. Id. at 120. Rather, the plaintiffs' claims concerned "whether they were wrongfully terminated from employment after an alleged oral contract of employment for a term." Id. The plaintiffs sought "compensatory damages for wages and pension, health, life and disability benefits that they would have been entitled to had the alleged contract to work until age 62 not been breached." Id.

The plaintiffs' claims are distinguishable from those in Pizlo. They are not alleging breach of a contract for employment for a term. Rather, they are alleging they were promised benefits under an ERISA plan and their employer did not deliver those benefits. Whereas in Pizlo the plaintiffs sought health, life and disability benefits as compensatory damages, the plaintiffs here appear to seek them as expectation damages. The court is, accordingly, unpersuaded that the court's analysis of the claims in Pizlo is relevant here.

The plaintiffs also analogize their state claims to those asserted in Smith v. Cohen Benefit Group, Inc., 851 F. Supp. 210 (M.D.N.C. 1993). In Smith, the plaintiff's employer changed health benefit plans when it merged with another company. Id. at 211. During the transition, the plan administrator told

the prospective participant employees that if they were covered under the old plan, they would also be covered under the new plan. Id. The plaintiff, in reliance on this representation, chose not to convert his coverage under the old plan to a private policy within the time he was eligible to do so, and instead enrolled himself and his family in the new plan unaware that the new plan contained an exclusion for preexisting conditions. Id. at 211-12. When his daughter was hospitalized and coverage was denied on the basis of a preexisting condition, the plaintiff sued his employer, the plan, and the plan administrator under ERISA and state law. Id. at 212. The court, noting that the plaintiff's damages could be measured by benefits that he could have received under the foregone option of a private policy, held that the plaintiff's claim of detrimental reliance against the plan administrator related only indirectly to the ERISA benefit plan, and, so, was not completely preempted.

The court agrees with the plaintiffs that their state claims are similar to those alleged in Smith to the extent that the plaintiffs seek damages in the form of benefits foregone when they left their employment with the state to work for BrickStreet in reliance on BrickStreet's representations of disability benefits without a preexisting condition limitations. This is

the reason that the court held in its September 25, 2008, opinion that the plaintiffs' claims were neither preempted nor completely preempted. However, since that opinion and order was entered, the plaintiffs have indicated that they seek more than just reliance damages. They also seek damages measured by BrickStreet's ERISA plan benefits. To the extent they seek plan benefits, their state claims relate to an ERISA benefit plan as in Chapman and are distinguishable from the claims alleged in Smith. Their claim are, accordingly, completely preempted.

The plaintiffs' final contention in their motion to remand is that their state law claims are not preempted because the representations on which they relied were made before BrickStreet's ERISA plan came into existence. As BrickStreet aptly notes, the Fourth Circuit's decision in Elmore v. Cone Mills Corp., 23 F.3d 855 (4th Cir. 1994), suggests that the timing of the representations does not matter. See Elmore, 23 F.3d at 863 (holding that plaintiffs' state law claims including breach of contract and fraud, which were based on representations made before the employee stock ownership plan was adopted, were related to an ERISA-covered plan and were preempted).

IV. Conclusion

Based upon the foregoing, the court concludes that it has subject matter jurisdiction over the plaintiffs' claims inasmuch as the plaintiffs seek plan benefits pursuant to ERISA sections 514(a) and 502(a) in addition to damages under state law. It is, accordingly, ORDERED that the plaintiffs' motions to remand be, and they hereby are, denied.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: August 20, 2009

John T. Copenhaver, Jr.
United States District Judge